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REPORT OF THE WORKING GROUP ON INSOLVENCY LAW ON THE WORK OF THE EIGHTEENTH SESSION (Vienna, 30 October - 10 November 1995)

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I. INTRODUCTION

1. At the present session, the Working Group on Insolvency Law commenced its work, pursuant to a decision taken by the Commission at its twenty-eighth session (Vienna, 2-26 May 1995), to embark on the development of a legal instrument relating to cross-border insolvency 1/.

2. The Commission's decision to undertake work on cross-border insolvency was taken in response to suggestions made to it by practitioners directly concerned with the problem, in particular at the UNCITRAL Congress, "Uniform Commercial Law in the 21st Century" (held in New York in conjunction with the twenty-fifth session, 17-21 May 1992). The Commission decided at its twenty-sixth session to pursue those suggestions further 2/. Subsequently, in order to assess the desirability and feasibility of work in this area, and to define appropriately the scope of the work, UNCITRAL and the International Association of Insolvency Practitioners (INSOL) held a Colloquium on Cross-Border Insolvency (Vienna, 17-19 April 1994), involving insolvency practitioners from various disciplines, judges, government officials and representatives of other interested sectors including lenders 3/.

3. The first UNCITRAL-INSOL Colloquium gave rise to the suggestion that work by the Commission should, at least at this stage, have the limited but useful goal of facilitating judicial cooperation, and court access for foreign insolvency administrators and recognition of foreign insolvency proceedings (hereinafter referred to as "judicial cooperation" and "access and recognition"). It was also suggested that an international meeting of judges take place specifically to elicit their views as to work by the Commission in this area. Those suggestions were received favorably by the Commission at its twenty-seventh session 4/.

4. Subsequently, the UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency was held (Toronto, 22-23 March 1995). The purpose of the Judicial Colloquium was to obtain for the Commission, as it embarked on work on cross-border insolvency, the views of judges and of Government officials concerned with insolvency legislation, on the specific issue of judicial cooperation in cross-border insolvency cases and the related topics of access and recognition 5/. The consensus view at the Judicial Colloquium was that it would be worthwhile for the Commission to provide a legislative framework, for example by way of model legislative provisions, for judicial cooperation, and to include in the text to be prepared provisions on access and recognition. In taking note of the views expressed at the Judicial Colloquium, the Commission noted that the Working Group would examine a range of matters raised at the Judicial Colloquium relating to the possible scope, approaches and effects of the legal text to be prepared.

5. The Working Group, which was composed of all States members of the Commission, commenced its work at its eighteenth session, held at Vienna from 30 October to 11 November 1995. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Brazil, Chile, China, Ecuador, Finland, France, Germany, India, Iran (Islamic Republic of), Italy, Japan, Nigeria, Russian Federation, Saudi Arabia, Singapore, Slovak Republic, Spain, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Uruguay.

6. The session was attended by observers from the following States: Bosnia and Herzegovina, Canada, Costa Rica, Gabon, Greece, Indonesia, Iraq, Kuwait, Netherlands, Paraguay, Philippines, Republic of Korea, Sweden, Switzerland, Turkey and Yemen.

7. The session was attended by observers from the following international organizations: Banking Federation of the European Union, European Insolvency Practitioners Association (EIPA), International Association of Insolvency Practitioners (INSOL), International Bar Association, and International Credit Insurance Association (ICIA).

8. The Working Group elected the following officers:

Chairman: Ms. Kathryn Sabo (Canada)

Rapporteur: Mr. Ruthai Hongsiri (Thailand)

9. The Working Group had before it the following documents: provisional agenda (A/CN.9/WP.V/WP.41) and a Note by the Secretariat containing a review of possible issues to be covered in a legal instrument dealing with judicial cooperation and access and recognition in cases of cross-border insolvency, which was used as a basis for the Working Group's deliberations (A/CN.9/WG.V/WP.42).

10. The Working Group adopted the following provisional agenda:

1. Election of officers;
2. Adoption of the agenda;
3. Cross-border insolvency;
4. Other business;
5. Adoption of the report.

II. DELIBERATIONS AND DECISIONS

11. The Working Group considered judicial cooperation and access and recognition in cross-border insolvency on the basis of the note prepared by the Secretariat (A/CN.9/WG.V/WP.42).

12. As the Working Group progressed with its consideration of document A/CN.9/WG.V/WP.42, it established an informal drafting group to prepare preliminary draft provisions on a number of issues, reflecting the deliberations and decisions that had taken place. The deliberations and conclusions of the Working Group, including its consideration of various draft provisions, are set forth below in chapters III and IV.

III. JUDICIAL COOPERATION AND ACCESS AND RECOGNITION IN CROSS-BORDER INSOLVENCY

A. General remarks

13. The Working Group commenced the session with a discussion of various background and general aspects of the work being undertaken by the Commission in the field of cross-border insolvency.

14. The Working Group noted the apparent progression in the view with which matters of insolvency law were held, as regards possible work by the Commission. That progression was illustrated by the fact that at earlier points in its history the Commission had refrained from work on a subject such as security interests in part because of its significant implication of insolvency law, while now it was embarking on a project relating to the latter subject. Factors cited as underlying the current view in the Commission as to the desirability and feasibility of work on cross-border insolvency included in particular the significant regional harmonization efforts that had taken place in the intervening period, the increased incidence of cross-border insolvency that naturally attended the continuing globalization of trade and investment, and the limited scope and goals of the work being undertaken.

15. Another factor cited as an indication that at this point in time a positive contribution could be made by the Commission in this field was the close cooperation with practitioners that had characterized the preparatory work undertaken thus far for the project and that had been a key element in defining the parameters of the project. Reference was made to the Judicial Colloquium, which had taken place as an outgrowth of that cooperation and which had provided evidence of the interest and willingness of judges from different countries and legal systems to engage in cooperative efforts in dealing with cross-border insolvency, and of their interest in the work being undertaken by the Commission.

16. Concerning the parameters of the work being undertaken, various interventions emphasized that, with a view to preserving the feasibility of a successful outcome of the project, it would be necessary to confine the work to a relatively modest scale and goals, as had in fact been envisaged by the Commission. It was noted that, in view of the current disharmony of law and wide lack of provisions dealing with cross-border insolvency, the work on access and recognition envisaged by the Commission, though of relatively modest proportions, could nevertheless make a significant contribution in support of international trade and investment by increasing predictability and legal certainty.

17. The view was expressed that part of that effort to maintain the project within parameters of a modest but feasible scope would have to be the avoidance to the degree possible of certain terminological or conceptual formulations that would be likely to engender difficulties. Cited as an example in this regard was the notion of "reciprocity", which could be understood in sharply differing ways. Another example cited was the notion of "domicile", which was described as difficult of determination and therefore capable of generating uncertainty.

18. As a further aspect of keeping the project within the confines of feasibility, the Working Group was urged to keep in mind the inevitability that significantly differing policy approaches would continue to characterize national attitudes to matters of insolvency and that it was not the goal of the Commission's work to overcome or eliminate those differences. It was emphasized that the work should rather be confined to establishing a limited number of basic principles and threshold rules that would facilitate efficiency and speed in responding to cross-border insolvency cases and that would apply both in States that used judicial means for dealing with insolvency and those that applied administrative approaches.

19. More specific remarks directed at the substantive scope and structure of the work being undertaken included the suggestion that it could usefully be approached analytically from two basic aspects. The first aspect was the protection and gathering of assets, the second being the distribution of assets. Emphasis was also placed on the importance of indicating the essential elements of the types of proceedings to be covered. Suggestions for such essential elements included that the proceedings to be encompassed should be of a collective character, should involve supervision of the debtor by an independent party and should not cover financial adjustment measures undertaken by parties purely on a private basis, without court or administrative involvement.

20. A number of suggestions were made aimed at expanding upon or supplementing the issues raised in the working paper before the Working Group. One such suggestion was that a fundamental premise that the Commission could usefully promote was that national insolvency laws should accord foreign creditors "national treatment", to the effect that creditors would not be discriminated against on the ground of nationality. At the same time, it was observed that the notion of "national treatment" might be seen as related to the question of the distribution of assets, and that consideration of it might more appropriately follow deliberations on issues related to protection and gathering of assets.

21. Another suggestion concerned the nature of the notice of insolvency proceedings provided to creditors. It was stated that a particularly prevalent case, perhaps more so than the case of a debtor with multinational attributes, was the case of a debtor with creditors in more than one jurisdiction. It was suggested that the latter type of case highlighted in many instances the inadequacy of existing notice requirements, which often were limited to publication, in effectively providing foreign creditors with the opportunity to participate in insolvency proceedings. The Working Group agreed to consider those and other possible additional issues in its deliberations.

B. Possible decisive factors for access and recognition

(1) Competence

22. The Working Group noted that there were jurisdictions that premised their response to requests for recognition of foreign insolvency proceedings on examining in the first place the question of whether the foreign proceedings were validly opened. It was suggested that it would be appropriate to reflect in the instrument to be prepared by the Commission such an approach, which involved, as a requirement for recognition, the presence of requisite "connecting factors" between the debtor and the jurisdiction in which the insolvency proceedings were opened.

23. Views were exchanged as to possible methods of expressing such a requirement, and as to which of several possible connecting factors should be key in assessing, for the purposes of recognition, the competence of the foreign jurisdiction to open the proceedings sought to be recognized. Possible factors included domicile, habitual residence, place of a company's registered office, principal place of business, centre of the debtor's main interests, and location of assets.

24. One view was that, from the standpoint of providing the greatest possible degree of predictability, the dispositive connecting factor should be, in the case of a legal person, its seat or registered place of business, and, in the case of a natural person, domicile. It was suggested that such an approach would provide the maximum possible degree of predictability and certainty. Cited as a disadvantage of such an approach was its lack of flexibility to take into account other possibly significant connecting factors and to deal with cases in which it would be desirable to recognize proceedings emanating from jurisdictions other than the domicile or seat of the debtor. It was suggested that a more appropriate formulation would therefore be to refer to the "centre of the main interests of the debtor".

25. A third suggested approach, relating to assessment of the validity of the foreign proceeding involved, rather than a reference to one or the other particular connecting factor, simply the establishment of a rebuttable presumption in favour of the validity of the foreign insolvency proceeding. Advantages cited in favour of such an approach included that it would facilitate cross-border assistance while still preserving the opportunity for a challenge to recognition related to the question of the competence of the foreign jurisdiction. It was also pointed out that such an approach would take into account that in a large number of cases the validity of the foreign proceeding would not necessarily be contested because, for example, there might not be in the recognizing jurisdiction creditors to challenge validity. A further attractive aspect of the third approach was that it would avoid the potentially undesirable exclusionary effect of a test based on a single factor, namely, that proceedings founded on other than the connecting factor used as a filter would be precluded from recognition.

(2) Foreign proceedings emanating from prescribed countries

26. The Working Group noted that an approach used in a number of countries was to provide for assistance to be accorded to foreign insolvency proceedings from countries on lists of countries prescribed for such assistance.

(3) Court discretion

27. The Working Group noted that another approach relating to recognition of foreign insolvency proceedings involved the exercise of court discretion based on statutory guidelines. The view was expressed that such an approach might be discussed further in the context of the effects of recognition.

(4) Types of proceedings

28. The Working Group considered the question of which types of proceedings should fall within the scope of the recognition provisions. Mention was made of including in a definition of the proceedings covered certain basic elements such as the collective representation of creditors and removal of assets from the control of the debtor.

29. Wide support was expressed for the view that recognition should be limited to proceedings that were somehow officially sanctioned, whether by way of a court order or an order issued by an administrative authority. It was stated that private financial adjustment arrangements that might be entered into by the parties outside of judicial or administrative proceedings could take a potentially large number of forms and were not suitable material for a general rule on recognition. It was widely felt that providing for recognition of proceedings under a judicial or an administrative authority would address the normal type of case and would be an appropriate limit to the scope of the work.

30. The question was raised as to how to deal with the fact that there existed in certain jurisdictions forms of reorganization proceedings that were unknown or that would not be readily recognized in some other jurisdictions. An example of such a case was the "debtor in possession" type of reorganization proceeding. A related concern was that the recognition provisions should not place the recognizing court in the position of having to determine de novo whether the proceeding sought to be recognized in fact involved an insolvency. One suggestion for dealing with such concerns was to include a requirement that the debtor should be under the supervision of an independent party. Another suggestion was to provide a rule to the effect that the foreign proceeding would be recognized as an insolvency proceeding if it were treated as such a proceeding in the originating jurisdiction. The point was also made that, to the extent that requests for recognition were made directly by one court to another, the problem of a requested court feeling that it needed to determine the basic question of whether an insolvency proceeding was involved could be alleviated.

31. In the discussion, it was observed that a distinction could be drawn between, on the one hand, access and recognition for the purposes of a foreign debtor determining the assets that fell within the estate and, on the other hand, for the purposes of foreign creditors making claims to the debtor's assets located outside of the jurisdiction in which the insolvency proceedings were taking place (recognition of foreign creditors). The question was raised whether different prerequisites might apply to the two cases.

32. The view was expressed that some of these difficulties might be avoided if, at least as a working method, the Working Group would first focus on liquidation and turn later to reorganization proceedings. In support of such an approach, it was suggested that it might be easier to reach consensus on recognition of foreign liquidation rather than on reorganization proceedings, since the latter were unknown in a number of jurisdictions. It was stated that, once a set of rules had been agreed on for liquidation proceedings, the Working Group could consider the question whether those rules could be applied to reorganization proceedings. Moreover, it was stated that addressing both liquidation and reorganization proceedings would require making a distinction between those two types of proceedings, which might be difficult, since often liquidation involved reorganization of assets and vice versa.

(5) Types of debtors

33. The Working Group engaged in a preliminary discussion of the question whether there should be any restriction on the types of debtors that should be covered in the text to be prepared, and in particular whether insolvencies of non-traders or of consumers should be excluded from coverage. It was noted that one way of accomplishing such an exclusion would be to limit the scope to legal persons. Reasons cited for exclusion of "consumer" insolvencies included that they were of relative unimportance in economic terms, particularly in the cross-border context, and that they would embroil foreign courts in the complexities of special rules and privileges applicable in other jurisdictions to protect consumers (e.g., exemptions of certain of the debtor's family or personal property). However, in favour of encompassing both natural and legal persons, it was stated that excluding natural persons would result in failing to cover significant cases in which substantial sums of money were owed by non-traders. In that connection, it was pointed out that, if non-traders persons were to be included in the scope of work, some types of property, such as family or personal property, might have to be exempted from the debtor's estate. A further factor cited was that it would be difficult to draw a clear distinction between consumer and commercial insolvencies, since no widely accepted criteria would necessarily be found for drawing such a distinction. A suggested approach to addressing the latter complication was to refer for the purpose of defining an insolvency as "consumer", to debts incurred for private or personal purposes.

34. Another possible issue of exclusion raised concerned certain types of institutional debtors, such as banks, insurance and investment companies. It was pointed out that certain such financial institutions were, under some rational legislation, excluded from coverage of ordinary insolvency law because they were normally, as regulated bodies, subject to separate regulatory law and authorities. It was pointed out that winding up of banks was often conducted in a special administrative setting and that coverage under normal insolvency legislation could be complicated by the presence of deposit insurance, a subject normally regulated by the law of the jurisdiction in which the bank might be located. Another element was that whether such institutions would be covered could depend on the particular circumstances. For example, a bank operating in a jurisdiction in a manner that made it subject to domestic regulatory law might normally not be subject to the normal domestic insolvency law, while a bank only with assets in a particular jurisdiction might see those assets subject to a secondary proceeding in that jurisdiction with respect to those assets.

35. The view was expressed that, at least at this stage, it would not be advisable to presume the exclusion of the possibility of covering banks and similar institutions, in particular since some of the most substantial cross-border insolvencies involved banks. It was also pointed out that, increasingly, large banks were subsidiaries of large trading corporations, and recognition of such banks' insolvency proceedings could be crucial to maximizing the value of the overall insolvency estate.

(6) Authority of foreign representative to act

36. The Working Group considered the question of the extent to and manner in which the recognizing court might wish to assure itself that the foreign representative had authority from the jurisdiction of the recognized proceeding to act abroad, in particular with respect to assets located abroad. It was reported that the question did not raise insurmountable problems as such in practice,

since in most jurisdictions the accreditation of a representative purported to have universal effect. However, the question was nevertheless felt to be significant since it did involve a matter of some concern to courts.

37. The view was expressed that, for a foreign representative to be recognized abroad, its identity and functions should be self-evident, and that this might not always be the case, unless the foreign representative was authorized for this purpose by a court in the originating jurisdiction and evidence of this could be produced. It was pointed out, however, that a requirement of an additional specific court order beyond the act of appointment could present a serious obstacle to effective action by the foreign representative, to the extent that it would deprive the representative of the crucial ability to protect assets in an expeditious fashion. It was also suggested that an alternative source of assurance to the foreign, recognizing court as to the authority of the foreign representative to act abroad might be found in a general statutory grant of authority to act abroad by the representative's home State to representatives of the type presenting the petition for recognition to the foreign court.

38. In the discussion, the question was raised as to the extent to which special agencies that existed in some countries for the purpose of supervising the operation of insolvency representatives, in the public interest or in the interest of creditors, might be entitled to judicial assistance abroad. The view was expressed that the question would raise less of a problem to the extent that such agencies, although perhaps appointed by an authority other than a court, would be acting as quasi foreign representatives in the pursuit of assets. It was also suggested that they should not have any more powers than a normal foreign representative, even though they might be associated with or appointed by Governments.

39. It was further stated that this as well as other aspects of the question of the foreign representative weighed in favour of a functional definition of a "foreign representative", rather than one using specific terminology, which may be capable of varying interpretations or degrees of understanding. It was also added that to some extent the questions that might be raised in the mind of a recognizing court as to the authority of a foreign representative to act abroad might be diminished if the application for recognition were to come from the foreign court rather than from the foreign representative.

(7) Public policy considerations

40. It was generally felt that the future set of rules should include a provision recognizing the right of States to withhold recognition on grounds of public policy. It was noted that such an exception was found in multilateral instruments and in national legislation dealing with recognition of foreign proceedings. The Working Group considered whether it would be feasible or advisable to qualify or define public policy considerations in a way that would ensure an appropriate application of the exclusion in view of the wide range of grounds that might arguably fall within such an exclusion and in view of the risk that it would carry of defeating the objectives of the legal text being developed. It was noted, for example, that some provisions of this nature applied if recognition would be "manifestly contrary" to public policy. Beyond such an elementary characterization, the addition of a more restrictive formulation failed to attract sufficient support, in view of the extent to which the details of the notion of public policy differed from State to State.

(8) Possible additional factors

41. Suggestions for additional issues relevant to factors that might be decisive for granting recognition included the proposal that definitions of terms such as "foreign representative", as noted above, and "foreign proceedings" should focus on functional aspects. Such an approach was said to be useful in preventing uncertainty due to terminological differences among legal systems.

42. As regards possible additional factors themselves, the Working Group considered whether to include a reference to reciprocity. In favour of inclusion of a reference to reciprocity, which was applied in some countries, it was suggested that such a filter would foster greater harmonization of law by increasing pressure on States to include in their own laws also provisions on cross-border insolvency.

43. At the same time, various interventions were directed at what could be viewed as disadvantages of including references to a reciprocity factor in the instrument to be prepared by the Commission. One such view was that including a reference to reciprocity would contribute to uncertainty, due to differing understandings and legislative concepts of the notion and due to difficulties in determining the extent to which reciprocity was actually available. It was also stated that inclusion of such a factor would be inconsistent with the basic aim of the project to foster greater international cooperation, and would send an inappropriate signal not in accordance with that aim.

44. The view was expressed that, in an effort to reduce the negative effects of a reciprocity provision, one might at the least distinguish between two approaches to reciprocity. One approach, less desirable according to that view, which was characterized as "positive" reciprocity, would require proof that reciprocal treatment would be accorded; the other, less deleterious approach, referred to as "negative" reciprocity, involved a rebuttable presumption that reciprocity was available in the jurisdiction whose proceeding was being recognized.

45. It was further observed that the aim of reciprocal treatment, which might be seen as being served most directly if the instrument were in the form of a convention, could conceivably be embodied in a model law as well. It was further suggested that a successful model law that was widely accepted could accomplish the goal of reciprocity without the inclusion in the model law of a reciprocity provision.

C. Effects of recognition

(1) Possible legislative approaches

46. The Working Group exchanged views as to various possible ways of addressing the central question of the effects that would flow from recognition of a foreign insolvency within the parameters of the project undertaken by the Commission.

47. Underlying the discussion was the basic understanding that there were a range of possible effects that could be attributed to recognition, including provisional measures designed to gather and protect assets, such as staying or freezing of individual creditor action against the assets in the

recognizing jurisdiction and authorizing the foreign representative to obtain information and evidence concerning the assets and economic activities of the debtor and to manage and administer assets, and, at the more final end of the spectrum of effects, authorizing the foreign representative to transfer assets and proceeds out of the recognizing jurisdiction.

48. It was also understood as a basic premise of the work being undertaken by the Commission that the implementation by the foreign representative of effects of recognition would typically involve, at least initially, some sort of intervention by a court or administrative authority in the recognizing jurisdiction. Accordingly, it would not be within the scope of the project to establish for all States a system for empowering foreign representatives to act in foreign jurisdictions in the absence of some such official sanction or assistance. However, it was noted that such an approach might be a possibility that would be considered by States willing to go in that direction and might be considered for inclusion in a menu of options presented to States by the Commission.

49. One possible approach considered for indicating the effects of recognition could involve an attempt at an exhaustive enumeration of the effects of recognition, akin, for example, to the approach followed in the Istanbul Convention. Such an approach did not attract wide support, in particular because of a concern that the potentially wide range of effects would render futile an attempt to enumerate them in a general and comprehensive fashion.

50. Differing views were exchanged as to a second category of approaches considered for indicating the effects of recognition, which involved reference to applicable law. A number of variants of such an approach could be considered, depending upon whether the recognizing court would be authorized to determine the effects of recognition in accordance with its own law, or by application of the law of the jurisdiction whose insolvency proceeding was being recognized. A further possibility was that the recognizing court would be authorized to apply either of those two laws.

51. Considerations adduced in favour of an approach based on application of the law of the recognizing court centered on the relative ease with which such a court could apply its own, familiar law, rather than a foreign law, with which it was likely to be unfamiliar. It was said that this approach would therefore make assistance to the foreign proceeding easier to grant and thus more likely, in addition to making for such reasons the Commission's instrument more acceptable to States.

52. Advantages cited in favour of an approach based on application of the law of the recognized proceeding stemmed from the likelihood that it would lead to a more consistent, harmonized result, in view of divergences among national insolvency laws, divergences that might be brought to the fore if the recognizing court were to apply a law at variance with the law of the main proceeding. It was also suggested that application of the law of the main proceeding was preferable so as to avoid abetting debtors seeking to conceal assets behind another law that might provide a haven for those assets from administration under the main insolvency proceeding, for example, by not deeming those assets to be part of the estate.

53. The Working Group also discussed an approach occupying something of a middle ground between the two alternative "applicable law" approaches referred to in the preceding paragraphs, one which would involve authorizing the recognizing court to apply either its own law or that of the jurisdiction from which the recognized proceeding emanated. It was said in favour of such a mixed

approach that it would provide flexibility needed to limit insulation of assets from insolvency proceedings and would therefore be in the best interests of creditors and of the maximization of the value of the estate. In regard to such an approach, the question was raised as to whether it might lead to a situation in which the foreign representative would be enabled to exercise more powers than those that would be available to the representative under the law of the appointing jurisdiction.

54. As a further aspect of the discussion of how to provide for effects of recognition, the Working Group noted that to one extent or another, depending in part on the applicable legal tradition and system, the precise effects of recognition could involve exercise by judges of judgment, or, in particular as understood in some legal systems, "judicial discretion", taking into account the circumstances involved in each individual case. It was further noted that, while judges in various legal systems were called upon and were used to exercise such judgment, there were traditional differences among legal systems as to notions of how much could be left to "judicial discretion".

55. As a way to achieve the basic, limited purpose of a quick and efficient opportunity to establish a cooperative link between jurisdictions in case of a cross-border insolvency, while still allowing room for different traditions and applicable legal notions, the Working Group viewed with considerable interest a proposal for an approach that would combine and bridge some of the considerations and approaches raised in the discussion. Under the proposed combined approach, the instrument being prepared by the Commission would establish a "minimum" list of measures or effects that would be triggered by recognition, centering on the need quickly to protect assets against dissipation and to allow time for a comprehensive assessment to be made of the situation, while at the same time leaving room for the possibility that the recognizing court could provide additional effects.

56. It was suggested that the latter aspect of the provision, which would leave open a window for judges to grant additional effects beyond those on the minimum list, could be crafted so as to involve factors or guidelines that would be familiar and well known to judges in different legal systems. Such factors could at the same time accommodate the degree of flexibility available for judicial action in various legal systems and could include in particular an assessment of whether local creditors would be disadvantaged in the main, foreign proceeding, of local procedural requirements, and of general considerations of public policy.

57. As regards effects that would be candidates for inclusion on the minimum list of effects, it was broadly agreed that the effects in a "minimum list" should focus on what would be needed to serve the immediate need of preserving the possibility that local assets could be considered for inclusion in a coordinated or comprehensive solution to the insolvency. The prime example of such effects was the staying or freezing, upon recognition, or perhaps even upon mere filing of an application for recognition, of individual creditor action and of transfer by the debtor of its interest in assets. It was suggested that the latter, earlier point of the effectiveness of such a stay would be more meaningful in view of the potentially critical time factor involved in preventing dissipation of assets. Other candidates for inclusion in the minimum list included empowering the foreign representative to obtain information and testimony concerning the assets and affairs of the debtor, and to take control of and to manage debtor assets.

58. In support of the above approach, it was stated that it would accomplish a fundamental purpose of the project, which was to introduce basic "enabling" legislative provisions that would create the capacity for judicial cooperation and recognition of foreign insolvency proceedings, as

there was currently a significant lack of such capacity in many national laws. At the same time, it would avoid relying merely on exercise of "judicial discretion" in a manner that raised the concern of diminished harmonization and acceptability across legal systems. Rather, in the area beyond the minimum list measures, it would recognize a degree of flexibility needed to enable judges to deal in a practical manner with cross-border insolvency cases, taking into account the particular circumstances of individual cases brought before them and other relevant factors, as they were generally accustomed to doing in all legal systems in other types of cases.

59. The question was raised as to whether the "minimum list" should include the possibility of overturning certain transactions of the debtor unfavourable to creditors generally, which took place within a period of time prior to the declaration of insolvency, a remedy referred to in some systems as "avoidance of preferential transfers". However, hesitation was expressed as to including this item on the ground that it involved particularly complex questions that were treated in significantly different ways from State to State. As regards the factors to guide the identification of possible additional measures beyond the measures on the minimum list, the view was expressed that mention should also be made of what was referred to earlier as "positive reciprocity" (see para. 44). That suggestion did not draw sufficient support.

(2) Exclusion of certain types of assets

60. It was noted that national laws contained exclusions of various types of assets either from the application of insolvency measures generally or specifically from rules governing disposition of assets in the cross-border context. For example, certain types of personal or family property might be excluded from the complete application of insolvency law, and, as evidenced in article 5 of the draft EU Convention, rights in rem of third parties might be excluded from coverage under rules on cross-border effects of the opening of insolvency proceedings. Reference was also made to the possible exclusion of immovable property from such rules.

61. A number of interventions suggested a possible tendency that the instrument to be prepared by the Commission might not attempt to disturb such exemptions, in particular since they may involve notions of public policy and sovereignty that States would wish to retain as subject to their own national law or private international law rules. However, the Working Group noted that this was a question that would need to be considered further. It was also noted that in considering the question of possible exclusion of rights in rem, attention would be given to the related question of assets in which a seizure had already been obtained.

(3) Procedural aspects of effecting recognition

62. The Working Group surveyed possible aspects of a provision that might be included in the instrument to be prepared by the Commission on giving effect to recognition and considerations related thereto. The range of possible approaches that might be considered differed in the degree of formality and the type and specificity of procedural detail. At one end of the spectrum were approaches that would require an express decision of recognition by a competent court, possibly involving also the initiation by the foreign representative of a local insolvency proceeding. At the other end would be an "immediate effect approach", in which, for example, effects of recognition and empowerment of the foreign representative to act in the recognizing jurisdiction would flow as

an effect of the opening of the foreign proceeding. It was pointed out that the former approach would provide the highest degree of legal certainty, while the latter approach was oriented toward serving the need of the foreign representative to obtain protective measures expeditiously. The Working Group also considered degrees of formality and procedure in between those two points.

63. A question underlying the discussion and possibly affecting the ultimate content of a provision on procedures concerned the extent to which the specific procedures might be left to the applicable law of the recognizing jurisdiction. Another motif in the discussion was that the content of a provision on procedure could be linked to the nature of the remedies or to the stage of recognition involved. The general thrust of such an approach would mean that the extent of procedural requirements and formality might depend upon whether the measures involved were of an emergency, provisional type required for the immediate protection of assets, or whether the measures were of a more final nature, such as a final decision on recognition of the foreign representative or a general stay of creditor action. The former type of measures might be subject to a lesser degree of procedural formality, while the latter would likely be subject to a higher degree of formality.

64. Another backdrop to the discussion was the generally held assumption that, in the context of the instrument being prepared by the Commission, giving effect to recognition would require some degree of judicial or quasi-judicial action and control, in particular were the instrument to be in the form of a model law, subject to unilateral legislative adoption, and since it would not in any case be an instrument limited to adoption in a regional context. Thus, there was little indication that an "immediate effect" type of approach was a practical option for inclusion as the approach to be followed by States generally.

65. With the above elements as possible guidelines for considering a provision on procedures, the Working Group discussed more detailed aspects of procedures. One question was the extent and timing of notification to creditors of the recognition of the foreign representative or of effects of that recognition such as a freeze of assets. It was noted generally that jurisdictions typically imposed notification and publication requirements, for example, advertisements inviting proofs of claims to be brought forward, at one or more stages of insolvency proceedings. Considerations raised in this regard were that any such publication requirement should not apply too early in the process. Such a timing might defeat the ability of the foreign representative to meaningfully protect assets against dissipation or concealment, in particular if a publication or notification would be required before an emergency freeze of assets would take effect and would provide a window for a debtor or creditors to dispose of assets prior to the taking hold of a freeze.

66. It was also pointed out that notification of measures granted to a foreign representative should not be assumed to be appropriate at an early stage in the process in particular if a final decision on recognition had not yet been reached and the possibility still existed that recognition would be denied. The concern in this regard was that a premature notification or publication could unjustifiably harm the reputation of the debtor as well as its ability to carry on commercial activity, in addition to possibly running afoul of constitutional due process doctrines. At the same time, it was noted that notification given at too late a stage could prejudice the legitimate interests of creditors and would fail to address what was reported to be a common complaint of creditors, namely, lack of sufficient information concerning the insolvency proceedings.

67. The further point was made that it could probably be generally assumed that the applicable insolvency law and jurisprudence of the recognizing jurisdiction would lead to adequate notification and publication, which would limit the extent to which the matter would need to be addressed in any great detail in the instrument being prepared by the Commission. At the same time, some basic treatment of the question might be helpful since approaches in national laws did vary and some common minimum ground might have to be found concerning notification of measures for which provision would be made. Examples of various approaches in national law included a national law that provided publication only once a final decision on recognition was issued. There was support expressed in the discussion for the notion that for certain aspects there might usefully be an earlier point of notification. It was suggested, for example, that, when a provisional measure was put in place freezing an asset prior to the decision on recognition it might well be appropriate to notify the specific parties directly affected by the freezing order.

68. The above discussion suggested that, as regards the notice requirement, an appropriate approach might be to leave the exact details of the notice and publication requirement to the court involved in issuing a recognition order or in ordering specific protective measures. Beyond that aspect, a suggestion was made that some measures of a protective nature may have to be provided that would take effect upon application for recognition, rather than waiting to take effect until the decision on recognition, and that this possibility needed to be recognized. In addition, there was a broadly held view that the text should affirm that the foreign representative should have access to the court competent to issue the necessary recognition and protective orders, and in particular that some protective order may have to be issued in a particularly prompt manner, perhaps involving an ex parte proceeding. It was noted that such ex parte avenues were not unfamiliar to legal systems generally and typically provided an opportunity for notification and challenge after the initial ex parte stage. (See also the discussion of notice questions in paras. 84 to 87, and 170.)

69. As to which court in a particular country would be competent, reference was made to several potential factors, including the proximity of a court to assets in question and to the possibility that a court being requested to issue emergency protective measures might not necessarily be the court competent ultimately to rule on the application for recognition. It was generally felt that because of the diversity of such factors it would not be feasible or appropriate to attempt to refer to a specific court or courts in the instrument being prepared by the Commission. It was suggested, however, that it might be helpful to state that there should be court access and to provide for an indication by enacting States themselves of which of their courts would be competent in these matters.

D. Secondary insolvency proceedings

70. The Working Group next turned to a discussion of the question of the implications for judicial recognition and court access for, and recognition of, foreign insolvency proceedings of the opening of a separate insolvency proceeding in the recognizing State. It was noted that the effects of recognition of a foreign insolvency proceedings could be blocked to one degree or another by the opening of a separate insolvency proceeding, and, in order to limit such blocking effects, various limitations could be placed on the opening of such a separate proceeding (sometimes referred to as "secondary proceedings").

71. It was also noted that there were various ways found in legal systems for linking such secondary proceedings to the foreign proceedings, including providing that in view of the existence of a foreign insolvency proceedings it was not necessary to prove the insolvency of the debtor as a prerequisite for the opening of a secondary proceeding. Another important link may be to permit the foreign representative to request the opening of such proceedings. Varying degrees of precedence may be assigned to the foreign proceeding by: restricting the jurisdiction to open secondary proceedings; restricting the right of creditors to request the opening of such a proceeding; and restricting the right of creditors to payment from the proceeds of the liquidation of assets in the secondary proceeding. The attention of the Working Group was also drawn to a system in which recognition of a foreign proceeding automatically triggered the opening of a secondary proceeding.

72. Various observations were made as to the relative desirability of such secondary proceedings. Those observations included, on the one hand, an acknowledgment of the possible undesirability and disadvantages of such proceedings from the standpoint of the goal of recognition of foreign insolvency proceedings, and, on the other hand, an emphasis on the possibility that such proceedings could actually serve a positive purpose. That being said, the view was widely shared that the instrument to be prepared should acknowledge rather than resist the possible phenomenon of a plurality of insolvency proceedings. It was felt that, rather than attempting to restrict secondary proceedings, a goal which, it was said, would not be appropriate for the Commission's work though it may be so within the context of a regional convention as in the case of the EU draft, the instrument should seek to facilitate and maximize the degree of cooperation and coordination between proceedings in more than one jurisdiction. It was generally felt that such an approach would heighten acceptability of the legal text to be prepared, while leaving room for a realistic and effective contribution to be made by the Commission in the field of cross-border insolvency.

73. A number of considerations and questions were raised which could affect the content of provisions in line with the above approach. One basic question concerned the extent to which the legal text could deal in a detailed fashion with the specific manner and procedures of coordination and cooperation between insolvency proceedings. Possible aspects and techniques of cooperation and coordination included: according national treatment to foreign creditors, to the effect that preference to local creditors would only be given on the basis of the nature of their claims, rather than on the basis of their nationality; exchange of information regarding the proceedings and the assets of the debtor; a duty of administrators from the proceedings to cooperate; a right of the foreign representative to intervene in the local proceedings; continuation of rights accorded to the foreign representative at least until actual commencement of local proceedings, rather than interruption of those rights by the mere filing of an application for local proceedings which may remain pending for a period of time; right of repatriation of assets and proceeds of the local liquidation; and application of the rule that a creditor who has received part payment in one proceeding may not receive a dividend for the same claim in another proceeding until other creditors of the same ranking or category have in that other proceeding obtained an equivalent dividend (referred to in some jurisdictions as the "hotchpot" rule).

74. The attention of the Working Group was also drawn to various distinctions that might be addressed in detailing the relationship between proceedings in different jurisdictions. Those included the manner of determining which proceeding would be deemed the "main" proceeding, as opposed to a "secondary" proceeding, a question which would not necessarily depend on chronology as much as on purposes of proceedings, and whether a local proceeding was opened exclusively for the purpose of granting assistance to a foreign proceeding, or was in the nature of an actual local

insolvency proceeding.

75. In view of the above range of variable circumstances, possibly affecting the nature of cooperation and coordination that might be applied, and the nature of different possible insolvency proceedings taking place in parallel, considerable support was expressed for the view that the Commission legal text should neither attempt to draw specific distinctions in the nature of a hierarchy of proceedings in the context of plurality, nor attempt to define extensively the exact measure of cooperation and coordination among those proceedings. Rather, according to that view, the contribution to be made by the Commission would lie in affirming the principle of maximizing cooperation and coordination and providing legislative, enabling authority for judges inclined to cooperate in any given case. It was recalled in this regard that it was the lack of such enabling provisions in many jurisdictions that constituted an obstacle to effectively dealing with cross-border insolvencies.

76. At the same time, the view was expressed that a simple hortatory statement of principle concerning cooperation and coordination might be deemed insufficient in legal systems that would seek in legislation greater guidance as to what courts could do in response to requests for cooperation or coordination. Suggestions to address that concern included to refer in an indicative list to certain basic measures such as communication of information regarding assets of the debtor and to other aspects of cooperation and coordination. Another suggestion was to focus on a duty on the part of administrators to cooperate, though it was observed that a significant role would always remain for the court, despite the fact that in some jurisdiction administrators might be assigned a relatively larger share of the responsibility for implementing cooperative activities. It was furthermore pointed out that the degree to which defining the details of cooperation would be left to courts would be tempered by the likelihood that measures adopted by courts would often largely be based on requests from counsel.

E. Access for foreign representative

77. It was noted that at earlier points in the discussion, a convergence of views had emerged as to the desirability of providing the foreign representative with direct access to the competent court for the purpose of applying for recognition and obtaining the appropriate protective measures. At this stage of the discussion, the attention of the Working Group was focused on what might be said beyond that general principle in the legal instrument to be prepared by the Commission. The widely shared view was that the maximum possible degree of flexibility should be encouraged and the minimum degree of obstacles should be involved in the process.

78. In terms of an actual provision reflecting the above principles, considerable support was expressed for basing a provision on the foreign representative providing, in a simplified process, proof of appointment in the foreign proceeding. This could involve presentation of a certified copy of the document of appointment in the foreign insolvency proceeding. It was observed that such an approach would meet the test of simplicity, while still addressing issues raised in the discussion of the assurance that the recognizing court would wish to have of the authority of the foreign representative to act. It was further observed that such an approach would be along the lines of the technique utilized in the draft EU Convention.

79. Requiring the foreign representative to prove, at the application stage, that assets existed in the recognizing jurisdiction did not attract support. It was felt that the imposition of such a threshold requirement would create an obstacle to the basic purpose of an application for access and recognition, which could be in fact to obtain information as to whether such assets were present in the recognizing jurisdiction.

F. Judicial cooperation

80. Beyond what had been discussed at earlier points in the session as to the desirability of encouraging and facilitating cooperation among jurisdictions involved in cross-border insolvencies, the Working Group considered the role that could be played by ad hoc protocols or concordats that were sometimes agreed by the parties involved, and sanctioned by courts, as a tool for laying down the specific aspects and terms of reference of cooperation and coordination. It was noted that such protocols had been successfully utilized in a number of large, particularly prominent cases of cross-border insolvency. It was further noted that the IBA had developed a model Concordat that parties might use as a guideline in formulating a protocol dealing with issues such as designation of the administrative forum and choice of applicable law to govern various issues including avoidance of transfers and priority rules for distribution of assets.

81. The Working Group recognized the potential utility of ad hoc protocols in establishing the orderly resolution of cross-border insolvency cases, and it was generally agreed that the instrument to be prepared by the Commission should avoid throwing obstacles in the way of adoption of such protocols. At the same time, it was pointed out that possible questions regarding such protocols included their implications for rights sought to be enforced by individual creditors. In response to that question, it was stated that such protocols should not be regarded as precluding the rights of individual creditors. It was also noted that the IBA model Concordat dealt with the basic question of the treatment of claims by providing that general or common claims should receive the same pro-rata treatments in all proceedings, and that priority claims were to be dealt with according to the law of each jurisdiction involved.

82. Another aspect of cooperation addressed at this stage of the discussion was the possibility of judicial communication in furtherance of cooperation. Aspects of that question included: the fact that different stances may be taken by legal systems as to judicial communication, with some States encouraging communication and other States prohibiting it and emphasizing traditional diplomatic and treaty-based channels for communication; varying degrees to which the onus of cooperative activities and communication would be placed on the insolvency administrators from the different jurisdictions involved; varying degrees of formality or informality that may be involved in such communication depending upon the stance towards such communication of the legal systems involved; and varying degrees of procedural due process that may be required in the exercise of such communication, for example the requirement of the presence or notification of the parties and the right of parties to participate in the communication, and bearing in mind that judicial communication could well be prompted by suggestions from counsel. Aside from strictures of a legal nature that might affect the exercise of judicial communication, reference was made to possible logistical obstacles related to language.

83. The generally shared conclusion at this stage with regard to the issue of judicial communication was that the instrument being developed should avoid placing obstacles in the way of such communication.

G. Additional issues

(1) Duty to inform creditors

84. The Working Group considered the extent to which the instrument being prepared by the Commission could deal with what was reported to be a common problem in the cross-border insolvency context, namely, that creditors often got information about the opening of an insolvency proceedings in another country late, or not at all. By way of background, it was further reported in this context that traditional notice procedures may be ill-suited for the cross-border context, in which foreign creditors may be handicapped by factors such as language, geographical distance and lack of understanding of the foreign proceedings. It was also pointed out that national systems differed as to whether a duty was imposed on the administrator to seek out creditor claims. Some national systems imposed an obligation on the administrator to seek out claims and to agree on the amount of payment, while in other systems the burden essentially was placed on claimants and no obligation was imposed on the administrator to make a reservation for claims that were not brought forward.

85. By reference to notice provisions in the draft EU Convention, the Istanbul Convention and certain national laws, the Working Group noted various possible elements of a notice system tailored to the cross-border environment, including: providing additional explanatory information concerning the foreign proceedings, such as whether a meeting of creditors would be held and whether failure to attend would result in waiver of a claim, and other information concerning filing of claims; allowing foreign creditors an additional period of time for filing of claims; providing multilingual forms for filing of claims, and allowing filing in foreign languages; and permitting the filing of claims in writing from abroad.

86. In terms of the content of a possible provision on notice that could be included in the Commission legal text, it was acknowledged that there would be limitations as to the degree of detail and regulation that could be attempted. It was generally felt that an affirmation of the requirement that foreign creditors should be notified of the opening of insolvency proceedings might be feasible, possibly along with a statement of principle concerning facilitation of participation of foreign creditors.

87. On a more detailed level, no objection was raised to setting forth a requirement concerning information to be included about the foreign proceedings, an approach which might make a useful contribution to the standardization of notice procedures internationally. Concerning the question of the timing of the notification of foreign creditors, the view was expressed that it should coincide with the issuance of notices to domestic creditors in the foreign proceeding. Regarding the question of the language of the notice, support was not evident for requiring the foreign representative to address the notice in a foreign language, based on a concern that imposition of such a requirement as a general rule would place an excessive burden on the representative.

(2) Duty of administrators to communicate information between themselves

88. It was generally acknowledged that cooperation and coordination in cross-border insolvencies would be facilitated by communication of information between administrators of the proceedings involved. Information that could be exchanged concerned, for example, lists of admitted creditors and disposed assets. While the desirability of exchange of information was emphasized, several interventions suggested that it would be difficult to define and formulate a provision that would go beyond a relatively vague statement of a duty to exchange information. The view was also expressed that the imposition of such duty might be complicated to the extent that representatives were lawyers subject to strictures based on attorney-client privilege.

(3) Equalization of rate of payment of claims

89. The Working Group noted that a basic principle of coordination and fairness in administration of cross-border insolvencies was that a creditor that had received part payment in one proceeding should not receive a dividend for the same claim in another jurisdiction until other creditors of the same ranking or category had in that other proceeding obtained an equivalent dividend ("hotchpot" rule). Inclusion of a reference to that principle was generally considered to be desirable and feasible.

90. The Working Group also considered whether to address in the instrument being prepared another technique used to ensure to the degree possible that some creditors would not enjoy undue advantage over other creditors in the liquidation of claims. That technique involved permitting each representative of a proceeding to "cross-file" claims from its respective proceeding in the other proceeding.

91. The question was raised whether such an approach was indeed the only or the optimal method for achieving the goal of equitable distribution that could be presented. It was suggested that an alternate avenue, perhaps more efficient for achieving the same end, would be to rely on an accounting approach involving adjustment of claims. It was suggested that such an approach might be more efficient as it did not rely on affirmative actions being taken by the representatives, and that the instrument should therefore take cognizance of that approach as well, in addition to reflecting the possibility of cross-filing. In support of including mention of cross-filing, it was emphasized that that technique was transparent and was of particular importance to small creditors, who could thereby see their claims pursued without the necessity of hiring local counsel in foreign proceedings.

92. Reference was made in the discussion to another technique employed for equalization of payment to creditors, namely, that of disgorgement or return of the benefit received by a creditor of individual action to enforce a claim on the debtor's assets. While no substantive objection was raised to the principle as such, and it was indeed possibly a particularly effective tool for achieving equalization, there was hesitation to address such measures, which would typically be treated under local law as a matter of liquidation of claims. It was further noted that, though disgorgement may fall outside the scope of the instrument being prepared by the Commission, it may well be within the scope of a regionally based convention (EU draft Convention, art. 20(1)).

93. A similar view was shared as to the probable difficulty of including mention of the principle of "marshalling", according to one notion of which creditors would be subject to an obligation in exercising rights with respect to assets to do so to the minimum disadvantage of certain other classes of creditors. While the principle was not questioned, it was said to be difficult to apply and enforce, and likely to raise questions such as what creditors would be entitled to for actual losses and whether they could claim for non-monetary damages. It was also noted that there existed differing concepts of "marshalling".

IV. CONSIDERATION OF PRELIMINARY DRAFT PROVISIONS

94. Subsequent to its review of the issues set forth in document A/CN.9/WP.42, the Working Group considered a number of preliminary draft provisions developed by the small ad hoc drafting group it had established.

A. Definition of "foreign proceeding"

95. The Working Group considered the following preliminary draft of a definition of "foreign proceeding":

> " 'Foreign proceeding' means a judicial or administrative proceeding in a foreign country for the purpose of liquidating the assets of a debtor for distribution to its creditors or adjusting the debts of a debtor to its creditors.
>
> Variant A
>
> A foreign proceeding shall be presumed to have been properly opened in the absence of proof to the contrary.
>
> Variant B
>
> The debtor in a foreign proceeding may be only a natural or a legal person which has its domicile, [principal] place of business or [principal] assets in the foreign country [and which is not subject to provisions for liquidation under regulatory laws of this country]".

96. The discussion of the above draft definition indicated a widely held view that the "foreign proceeding" to be recognized should mainly have three characteristics: it should be an insolvency proceeding in the broad sense, so as to cover both liquidation and reorganization proceedings; it should be a collective proceeding, in the sense that representation of the mass of creditors would be involved: and it should be a proceeding that was somehow officially sanctioned, whether by a court or an administrative authority. At the same time, a view was expressed that some matters referred to might be dealt with in the context of a provision dealing with the scope of application of the instrument to be prepared.

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97. It was suggested that the words "adjusting the debts of a debtor" might not be universally understood as a reference to reorganization proceedings, which were intended to be covered.

98. A number of further elements were suggested for inclusion in the definition of "foreign proceeding". One suggestion was that the term "collective" should be used to describe the proceedings. Another view was that this would not suffice, and that it would be clearer to refer, as a common denominator of what was intended to be covered, to equal ("pari passu") treatment of unsecured creditors. However, that suggestion raised the question whether it might inadvertently be read as excluding proceedings involving unsecured creditors. Another element suggested was to refer to "open and existing" proceedings, so as to avoid capturing mere pending applications. In addition, it was suggested that other elements that might be referred to in the definition could include the notion that the debtor, as a result of the opening of the foreign proceeding, should be divested, i.e. lose control over its assets. The concern was expressed, however, that such a reference might be understood differently from State to State and might lead inadvertently to exclusion of "debtor in possession" type of proceedings in which the debtor remained in place, through its activities were subject to court supervision or approval. In the discussion of possible basic elements of a definition, the Working Group was urged to adopt an approach that would be as inclusive as possible, and to avoid including numerous conditions in the definition to the degree that the definition would limit the achievement of the goal of facilitating recognition of foreign insolvency proceedings.

Variants A and B

99. The Working Group then turned to a discussion of the variants presented to embody two different possible approaches for referring to the assessment of the competence of the foreign court for opening the proceeding sought to be recognized. Variant A reflected the proposal that had been made that it would suffice to establish a rebuttable presumption that, from a jurisdictional standpoint, the foreign proceeding was validly opened. Variant B represented an approach based on assessing the competence of the foreign jurisdiction in the light of one or the other connecting factor.

100. It was observed that Variants A and B did not necessarily constitute alternatives, since the approach in Variant A might itself result in an assessment by the court based on factors referred to in Variant B.

101. With regard to Variant A, the concern was expressed that the words "properly opened" introduced some uncertainty, since the meaning of a "proper" opening of proceedings was not clear. In response, it was stated that the foreign proceeding should be recognized as having been "properly opened" if it were treated as such in the originating jurisdiction.

102. In the discussion, the view was expressed that at some point in the preparation of the Commission legal text, consideration would have to be given to whether a plurality of foreign proceedings could be recognized by virtue of the rules being established.

103. As regards Variant B, it was observed that the reference to the "principal" place of business of the debtor might be problematic in the contemporary environment as it could be difficult to determine for a multinational entity which of various significant places of business it might have

should be regarded as the "principal" one. It was also said to potentially raise the risk that, after an initial recognition of a proceeding on the basis of a "principal place" test, a later application may be made from another jurisdiction on the basis of the same factor. It was suggested in various interventions that for such reasons an approach along the lines of Variant A might be preferable as an effective way of providing courts with an opportunity to apply appropriately considerations of competence of the foreign jurisdiction.

104. As a further development of the formulation of Variant A, it was suggested that the presumption in Variant A of valid opening of the foreign proceeding could be phrased so as to provide exclusion of proceedings that did not involve a "substantial connection" between the debtor and the foreign jurisdiction.

105. Subsequently, and in view of the above discussion, the Working Group considered the following further revision of a draft definition of "foreign proceeding":

"(1) 'Foreign proceeding' means a collective judicial or administrative proceeding pursuant to a law relating to insolvency in a foreign country in which the debtor is subject to control or supervision by a competent person, body or authority, for the purpose of:

(a) the reorganization of a debtor's affairs, or

(b) liquidating the assets of a debtor.

(2) For the purpose of this law, foreign proceedings do not include proceedings where there is no substantial connection between the debtor and the jurisdiction in which those proceedings were opened".

Paragraph (1)

106. There was general agreement that the revised version of paragraph (1) represented measurable progress in the direction of a provision that could gain wide acceptance. It was noted, in particular, that the notion of "collectivity" of the proceeding was explicitly mentioned. Furthermore, the provision also now referred to the foreign insolvency proceeding as being pursuant to the insolvency law of the foreign country. This, it was observed, would permit the recognizing court to avoid examining de novo whether the proceeding was an insolvency proceeding.

107. However, a number of concerns and suggestions were expressed. One concern was that the reference to "control or supervision" might not be sufficient to make it clear that control under a State authority was meant. Another concern was that the order in which the references to reorganization and to liquidation were listed might be inappropriate and should be reversed in view of traditional preferences for liquidation in various jurisdictions. In support of the existing order, it was stated that there was an increasing trend toward greater attempts at reorganization and in that light the present order could be left in place, as well as for the reason that it reflected a logical progression of possible steps.

108. The proposal was made to add to paragraph (1) a reference to composition proceedings, namely, proceedings in which indebtedness was reduced while the debtor remained in control of its assets. The Working Group hesitated to add such a specific reference to composition proceedings. One view in that direction was that the broad category of "reorganization", which might be read more as an economic than as a legal term, would widely be understood as encompassing composition and other such proceedings. It was felt that adding such a specific reference to any particular form of reorganization might actually create uncertainty. Furthermore, it was observed that attempting a list of reorganization proceedings would run the risk of excluding some types of proceedings intended to be covered. While it was generally agreed that composition proceedings should be covered, the Working Group was not ready to reach a definitive decision on how best to achieve that result and deferred consideration of the matter to a later stage of its work. Possible approaches suggested included a definition of the term "reorganization" to cover the point, or a reference to it in a guide to enactment.

109. A number of suggestions or questions of a drafting nature were raised, including that: the term "body" could be deleted as it might be unclear and, in any event, was covered by the terms "person or authority"; it might be made clear that the terms "control or supervision" referred to the assets and not to the person of the debtor; and that reorganization could refer to the debtor's assets as well as to the debtor's affairs. In the discussion, the question was again raised as to whether the proceedings as defined were intended to apply to insolvencies of natural persons to the extent of encompassing consumer insolvencies.

Paragraph (2)

110. It was widely viewed that paragraph (2) referred to a rule on recognition of foreign proceedings, rather than to an element to be included in a definition of "foreign proceeding", and that the matter could be dealt with elsewhere in the text. The view was also expressed that stating that "foreign proceeding" did not refer to a proceeding in which there was no substantial link with the foreign jurisdiction might be confusing, since, with or without such a link to the foreign jurisdiction, the proceeding would be emanating from a foreign jurisdiction.

B. Definition of "foreign representative"

111. The Working Group considered the following preliminary draft of a definition of "foreign representative":

> "'Foreign representative' means a duly appointed trustee, administrator or other representative of an estate in a foreign proceeding who has been [specifically] authorized by statute or other order of court (administrative body) to act in connection with a foreign proceeding involving the debtor or its assets".

112. The concern was expressed that defining "foreign representative" by reference to various specific terms and titles used in various jurisdictions might create uncertainty in jurisdictions where the expressions would be unfamiliar and might have the unintended effect of being unduly restrictive, since the list would inevitably be incomplete. An alternative approach, which drew support, was to base the definition on the functions of the foreign representative, an approach of

the type found in article 2(b) and (d) of the EU draft convention. It was also observed that such an approach might tie in well with the functional approach of the definition of "foreign proceeding".

113. The Working Group was urged to avoid including the word "specifically" in the definition, since it would be unusual for a State to appoint an insolvency representative specifically to act abroad. Rather, it was pointed out, representatives or administrators were typically appointed with a general grant of authority to act in relation to the debtor and its assets.

114. After the above discussion, and in light of the views that had been expressed, the informal drafting group revised the draft provision to read along the following lines:

> " 'Foreign representative' means a person or body duly appointed in a foreign proceeding, who is authorized by statute, court or other competent authority to act in connection with the debtor's assets or affairs".

115. The revised definition of "foreign representative" was generally felt to be acceptable in principle. However, a number of concerns were expressed as to its precise formulation. One concern was that the words "to act in connection with the debtor's assets or affairs" introduced some uncertainty, since in various jurisdictions a number of persons could have the authority "to act in connection with" the debtor's assets or affairs, without necessarily being insolvency representatives. Such individuals might include, for example, judges, accountants, and supervising commissioners. In order to address that concern, the suggestion was made to replace the words "to act in connection with ..." by words along the following lines: "to administer or supervise the debtor's assets in the context of reorganization or liquidation proceedings". That suggestion was objected to on the ground that it might inadvertently lead to the exclusion of "debtor in possession" or "suspension of payment" types of proceedings, in which the debtor remained in control of its assets and could technically be regarded as exercising administration type of functions, although under the supervision of a judicial or administrative authority. An alternative suggestion aimed at ensuring that those types of proceedings would not be excluded was to refer to the exercise of the powers of administration or supervision of the debtor's assets or affairs, since, as previously noted, the debtor in possession could exercise those powers. That suggestion also was objected on the ground that reference to administration and supervision did not sufficiently clarify what persons or bodies were being referred to.

116. After discussion, the Working Group agreed that words along the lines of "person or body appointed ... to reorganize the debtor's assets or affairs, or to liquidate the debtor's assets" might be sufficient to address the concerns expressed, in particular the concern to make it clear that representatives of proceedings, in which a "debtor in possession" or suspension of payments in which the debtor remains in possession of assets were involved, were intended to be covered.

117. Another concern was that the word "duly" might give the impression that the recognizing court could refuse to recognize a foreign representative on the ground that the appointment was not in accordance with the procedural law of the originating jurisdiction. The prevailing view was that the provision did not intend to place that aspect before the recognizing court and that the word "duly" should therefore be deleted.

C. Judicial cooperation

118. The Working Group considered the following preliminary draft of a provision on judicial cooperation:

"(1) Where collective insolvency proceedings have been opened by the courts of this country and the courts of another country, the court shall have the authority to cooperate with the other court for the purpose of achieving the efficient administration of the debtor's assets and liabilities.

(2) The administrator shall comply with any order made by the court for the purpose of ensuring the cooperation provided for the above.

(3) The cooperation between [courts] shall be subject to

(a) the procedural requirements of the court;
(b) the protection of local creditors against undue prejudice or inconvenience;
(c) public policy".

119. It was recalled that the above provision had been developed in response to the view in the Working Group in the initial phase of the discussion (see paras. 75 and 76) that a provision on judicial cooperation would be necessitated in order to address the phenomenon of plurality of insolvency proceedings. It was noted that a provision on that subject would be particularly helpful to judges in jurisdictions that did not currently have a legislative framework or authorization for judicial cooperation and where the lack of such legislative support constituted an obstacle to judicial action in pursuit of cooperation. In the discussion of the specific aspects of the draft article, a number of questions, described below, arose. The Working Group was urged, during the consideration of those questions, to retain in its sight that the primary purpose of the provision was to serve as a basic enabling provision to make possible judicial cooperation, which in turn was one of the principle aims of the project.

Paragraph (1)

120. Questions were raised as to the types of possible contexts in which the draft provision on judicial cooperation was intended to apply. Those possible contexts could include, depending upon the intended scope of application of the provision, the case in which there was a main proceeding and one or more secondary proceedings, the latter being somehow subordinated to or limited in relation to, that main proceeding; the case of parallel proceedings claiming what might be referred to as "primary" jurisdiction; and the case of an "ancillary" proceeding opened in a jurisdiction for the purpose of providing assistance to a foreign insolvency proceeding. It was suggested that the appearance of those questions in the discussion had implications not only for the content of the present provision, but also suggested the possible need to tackle more fully at a later stage in the discussion the question of whether and how the instrument being prepared might deal more fully with the question of plurality of proceedings. That basic inquiry might address, for example, how one proceeding might be assigned primacy over another. The point was also made that it perhaps might not be necessary to delve into those aspects, at least as regards the present provision on judicial cooperation, since it was essentially a statement of general principle of cooperation, and, beyond that,

the specific measures taken would be within the power of the court to fit to the specific circumstances involved.

121. As regards the particular question of the type of context at which the current provision on judicial cooperation was aimed, it was noted that the provision had in mind generally the case of more than one proceeding taking place contemporaneously. It had not been specifically formulated to address the case of ancillary proceedings, an expansion of the scope of the provision that the Working Group was urged to consider. No objection was made to such an expansion of the scope of the provision.

122. The question was raised as to whether it would be desirable or, for that matter, feasible to identify the measures that should be understood to fall within the notion of "cooperation". While it was generally understood that precision would be helpful, in particular in those jurisdictions in which judges would require an indication of the measures they were empowered to take, hesitation was expressed as to including a definition as such of "cooperation". The concern was that such an approach would have the undesirable effect of limiting the degree of flexibility available to judges and thereby limiting their ability to fashion the measures to best fit the circumstances of individual cases brought before them, thus limiting the extent of cooperation.

123. At the same time, however, the Working Group was generally inclined to the view that something could be done to accommodate the desire for a description or indication of what was meant by "cooperation", without compromising the degree of flexibility needed to make cooperation in any given case meet meaningfully the circumstances at hand. Accordingly, it accepted favourably the suggestion that an attempt should be made to include an indicative or illustrative, i.e., non-exhaustive, list of possible cooperation measures.

124. As a further point relating to the definition of what in any given case might constitute cooperation, the attention of the Working Group was drawn to the possibility that one way in which cooperation between courts might be structured could involve the approval by the courts of an ad hoc protocol concerning various aspects of coordinating and establishing cooperation between the courts and parties involved. A model for such an agreement, it was noted, was the Concordat developed by the IBA.

Paragraph (2)

125. A number of interventions were directed at clarifying the intended purpose and subject parties of paragraph (2). In particular, the question was raised as to whether the obligation imposed on the administrator to comply with orders of the court aimed at implementing cooperation was addressed to an administrator appointed by the recognizing court, or perhaps also at the foreign administrator being recognized.

126. In response to the above line of inquiry, it was pointed out that the original intent of paragraph (2) was to assist a court that might not be in a position to engage directly in judicial communication with the court in a foreign jurisdiction to conduct such communication through the local administrator it had appointed. As such, the provision was directed at the local court and administrator of the recognizing country. At the same time, it was recognized that in some jurisdictions particular emphasis was placed, in cooperation and coordination matters, on the role of the administrators involved, rather than placing primary responsibility on the courts. It was suggested that this approach

should be acknowledged by emphasizing also the duty of administrators to cooperate and expanding the scope of paragraph (2) to cover the foreign administrator.

127. That suggestion to expand paragraph (2) to cover the foreign representative did not encounter objections as such. However, it was stated that consideration should be given to providing at some point in the text for a "limited appearance" by the foreign representative. Under that notion, an appearance by the foreign representative before the foreign court would not expose the foreign representative and the assets controlled by the representative to the full jurisdiction of the recognizing court. It was agreed that this was an issue that, in view of its importance to the basic questions of access and recognition, needed to be discussed more fully than would be possible at the present session, which did not mean, however, that further preparation of a draft provision on judicial cooperation would necessarily have to await the outcome of that discussion.

128. As a matter of drafting, it was suggested that paragraph (2) might be reformulated so as to refer to the authorization for the court to issue orders directed at achieving cooperation, rather than addressing compliance by administrators. It was said that this might be a way of avoiding a specific statement as to the addressees of the article, and the attendant questions that had been raised above (paras. 125 and 126). It was also suggested that the provision might be reformulated so as to avoid giving rise to the unintended interpretation that the administrator could choose not to comply with instructions of the court that were not considered to be for the purpose of ensuring cooperation.

129. A last point in the discussion of paragraph (2) was that it would probably be possible for the Working Group to engage in a more defined discussion of the issues that had been raised once it had before it a generally more developed provision on judicial cooperation, taking into account the points that had been made in the discussion of paragraph (1).

Paragraph (3)

130. Support was expressed for the inclusion of a provision along the lines of paragraph (3), which it was said would provide assurance that the text being prepared would be sensitive to the concern that the rights of local creditors and the procedural and public policy interests of the requested State should be taken into account.

131. As to the specific formulation of paragraph (3), it was suggested that the reference to the possible limitations on cooperation contained in subparagraphs (a), (b) and (c) could usefully be clarified so as to ensure that they would be understood, as they were intended, to be possible limitations on, rather than sources of authority for, cooperation. It was urged that any such reformulation should be sensitive to avoiding the suggestion that any and all cooperation should be withheld the instant that a possible inconsistency, no matter how minor, with local procedure, the interests of local creditors, or public policy had been detected.

132. A question was raised as to the meaning of the reference in subparagraph (b) to protection of local creditors against "undue prejudice or inconvenience". In response, it was stated that, while by its nature any insolvency prejudiced and inconvenienced creditors, the provision in question was intended to ensure that States enacting the text would not be prevented from protecting their local creditors from discrimination or particularly burdensome inconvenience. An example cited was the case of local creditors being prevented from filing claims in the foreign proceeding.

133. Another question as to subparagraph (b) was whether it needed to be included at all, since the notion of protecting local creditors might be subsumed in the reference to public policy found in subparagraph (c). While it was acknowledged that the factors could conceivably be truncated in such a fashion, the general view was that, in particular in view of the specific purpose of the provision, as outlined in the previous paragraph, it was advisable to distinguish the provision from the general reference to public policy.

D. Effects of recognition

134. The Working Group considered the following preliminary draft provision on effects of recognition:

"(1) The recognition of a foreign proceeding by a competent authority

(a) operates as a stay against

(i) the commencement or continuation of judicial, administrative or private actions against the debtor or its assets, except collective proceedings for liquidation or adjustment of debts ("local proceedings"), and

(ii) the transfer of any interests in assets by the debtor;

(b) authorizes the foreign representative, subject to public policy, to compel testimony or the delivery of written or electronic information by the debtor or others concerning the acts, conduct, assets and liabilities of the debtor;

(c) authorizes the foreign representative to take custody and management of assets of the debtor, subject to rights in rem;

(d) authorizes the foreign representative to intervene in local proceedings;

(e) authorizes the foreign representative to ask the court to grant such other appropriate relief as may be available to a liquidator under the law of the jurisdiction in which the foreign proceeding was opened (unless forbidden by local law) [and of the jurisdiction in which the limited proceeding has been commenced], subject in all cases to

(i) the procedural requirements of the court or authority;

(ii) the protection of local creditors against undue prejudice or inconvenience;

(iii) public policy.

(2) The effects of the recognition of a foreign proceeding shall continue until modified or terminated by the competent local court, or authority.

(3) A foreign representative may apply for recognition of a foreign proceeding and for provisional relief directly in a competent court or authority.

(4) Where it is appropriate to protect assets or the interests of creditors, provisional measures may be granted on the application of a foreign representative, provided that notice of the making of such order shall be made as ordered by the court. Unless the court or authority otherwise orders, an order for provisional measures shall continue until the application for recognition of the foreign proceedings is determined".

135. While the Working Group was aware that it would engage at later stages in further discussion of the bases on which recognition would be granted, it was noted that the above provisions were an attempt to reflect the stage that had been reached in the discussion earlier concerning effects to be attributed to recognition of the foreign insolvency proceedings (see paras. 54-59). In accordance with suggestions that had found favour with the Working Group in the earlier discussion, the draft article reflected a bifurcated approach along the following lines. Subparagraphs (a) to (d) of paragraph (1) listed the effects of recognition that would take hold automatically upon recognition of the foreign proceeding, while subparagraph (e) provided an open window for the possibility of the recognizing court granting additional forms of relief that might be appropriate in the given circumstances of individual cases. The granting of such additional forms of relief was predicated upon compatibility with local procedural requirements, protection of local creditors against undue prejudice or inconvenience, and public policy.

136. Further elements of the system established in the draft provision included: a provision, in paragraph (2), referring to the continuation in place of the effects referred to above until their modification or termination by the competent court or authority; establishment, by virtue of paragraph (2), of the right of the foreign representative to apply for recognition directly to the competent court or other authority; and the provision, in paragraph (4), of the possibility of obtaining provisional or interim measures in case such steps were warranted.

Paragraph (1)

Subparagraph (a)

137. Various observations, both of a substantive and of a drafting nature, were made concerning the stay provisions set forth in subparagraph (a). It was observed that the stay in subparagraph (i) may be difficult to accept for jurisdictions that exempted enforcement of claims of secured creditors from treatment under insolvency proceedings to the point that such enforcement action was not subject to stays of execution of individual claims. The view was expressed that this might be an issue on which States would wish to have options presented in the legal text.

138. Another observation was that some jurisdictions may wish to be able to go beyond the stay provided, so as to stay not only individual creditor action, but to stay also collective creditor action. It was noted in response to the latter comment that such a broadened stay would be possible under the draft article before the Working Group, pursuant to the discretionary relief courts were empowered to grant by virtue of subparagraph (e).

139. In the discussion of paragraph (1), the Working Group was urged in a number of interventions to consider making the stay provided for by subparagraph (a) subject to exclusion on public policy grounds. Reference to the possible primacy of public policy considerations was already included as one to the limiting factors or guidelines for the granting of discretionary relief beyond the minimum list, as provided by subparagraph (e), as well as in subparagraph (b), concerning the automatic authorization of the foreign representative to obtain information in the recognizing State upon recognition.

140. In favour of specifically subjugating the stay provisions to possible exclusion on public policy grounds, it was stated that a general provision providing for exclusion of recognition on public policy grounds would fail to take into account a distinction that could be drawn between the basic recognition decision and the scope of possible effects of that recognition, some of which may run afoul of public policy considerations in the recognizing State. Other grounds for or examples of exclusions included actions for injury or bodily harm, marital actions, civil status, alimony, and various administrative and criminal procedures. It was suggested that one approach may be to specify in greater detail the types of actions that would be stayed. The view was also expressed that the formulation of the stay provisions revealed a possible lack of limitations on the effects provisions in the minimum list, in this case, for example, as to the duration of the stay or of the other effects.

141. In response to those suggestions, the view was expressed that caution should be exercised so as to limit the extent to which emphasis was placed in the text on exceptions to what had already been agreed would be a minimum list of effects of recognition necessary in order to protect in an expeditious manner assets against dissipation and to achieve the basic aims of access and recognition. It was suggested in that vein that adequate consideration could be given to public policy considerations in the recognition decision as well as in a court review of a possible challenge on public policy grounds that could at any rate be made to enforcement of this and other effects of recognition.

142. The Working Group noted the comments that had been made as to the question of whether to specifically provide for a public policy exclusion of the stay provisions, and noted that the issues raised would be considered at future sessions on the basis of further provisions to be placed before it.

143. Additional comments included the suggestion that the mention in subparagraph (a) (ii) of the stay on transfer of the debtor's assets needed to be made subject to transfers that may be necessitated by the ordinary course of business. An example cited of this type of transfer, which would presumably be approved by the supervising authority, was the payment of salaries to employees. That suggestion did not draw objections, as it was recognized to reflect the needs of practice and, therefore, not intended to be precluded. Suggestions of a drafting nature included the observation that the notion of a "stay" of commencement of proceedings, rather than of an existing proceeding, might not be readily understood universally and might therefore be reformulated, and that, as had been noted earlier in the deliberations, the expression "adjustment of debts" would be reviewed and aligned with revised terminology to be used elsewhere in the text.

Subparagraph (b)

144. The Working Group noted that subparagraph (b), which referred, as one of the items on the minimum list of effects of recognition, to the right of the foreign representative to compel production of information concerning the affairs of the debtor, had been made subject to public policy limitations in the recognizing State. It was noted that such an approach would make the provision more palatable in legal systems that were not accustomed to the same level of or procedures for searching for information practiced in some other legal systems. The view was expressed that such concerns could be further ameliorated by some making the provision subject to the local law. However, the inclusion of such a further proviso did not draw wide support. It was pointed out that the intent of the legal text would indeed be to provide the local law on the subject, even if that meant that in this respect some modification of traditional practice or rules would be necessitated. A note of caution was also struck against imposing, with respect to this and other items on the minimum list of effects, conditions which might complicate the process of giving effect to recognition to the extent that achievement of basic goals of the exercise might be jeopardized. At the same time, it was noted in a number of interventions that the rule as presently constituted would not have the effect of enabling the foreign representative to go about obtaining information without regard to local procedural law.

145. The Working Group was inclined, however, to see express reference made in a future draft of the provision to the obtaining by the foreign representative of a court order for the purpose of compelling the production of information. It was considered that the addition of such a reference might be a way of addressing concerns that had been raised without compromising the efficacy of the provision.

146. The attention of the Working Group was drawn in the discussion to the question of how the information requirements would interrelate with rules concerning professional secrets. In response, it was stated that such considerations, which, incidentally, it was stated, did not relate directly to accountants, were more likely to be relevant in the context of criminal and civil proceedings and were less likely to be so in the context of insolvency proceedings. It was pointed out, however, that a secrecy problem that did affect insolvency proceedings stemmed from notions of bank secrecy.

147. As regards the reference to information in electronic form, the Working Group noted that consideration would be given at a later stage to the need to consider aligning terminology used to describe such forms of information with terminology used in other UNCITRAL legal texts, including those being prepared by the Commission specifically in the area of electronic data interchange.

Subparagraph (c)

148. As had been noted with respect to other effects of recognition in the minimum list of effects, the question was raised as to whether it would be desirable to provide for some types of limits on those effects. The point made in the context of subparagraph (c) concerned possible exemptions, for example, of family property.

149. Views were exchanged as to the appropriateness of the manner in which the exemption of "rights in rem", i.e., rights of third parties in certain types of chattel, was phrased. A view was expressed that that particular terminology might not be universally understood. It was therefore suggested that a better formulation might be to refer to the right of the foreign representative to take

custody and control of the assets to the fullest extent permitted under the local law. That particular phraseology did not attract wide support, however, as it was not regarded as providing the requisite degree of precision.

150. On a more fundamental level, the question was raised whether it was sufficient that an exemption of rights in rem was accorded only with respect to this specific effect of recognition, and not, in particular, with respect to the stay under subparagraph (a). It was stated that a broader exemption of in rem rights, which some jurisdictions considered as exempt from insolvency proceedings, would contribute to the greater acceptability of the text being prepared. A countervailing view was that it was inadvisable to extend the in rem exemption to other effects of recognition, as this would dilute the value of recognition in protecting the assets against dissipation, and since the holders of in rem rights would in any event be permitted under paragraph (2) to apply for relief from application of the stay.

151. In the discussion, the question was raised as to whether exemptions of in rem rights from the effects of the recognition provisions would preclude avoidance of transfers by the debtor of such in rem rights in a manner detrimental to other creditors. In response, it was stated that exemption of in rem rights from the operation of the legal text should not necessarily be regarded as precluding avoidance of such transfers. It was also pointed out that the approach followed in a number of jurisdictions for identifying the law applicable to such questions was based on the lex rei sitae notion.

152. After its deliberations on the issues raised in connection with subparagraph (c), the Working Group was of the opinion that the provision and the matters raised would have to be considered further, in particular in the light of other provisions in the text as they were developed further.

Subparagraph (d)

153. The Working Group noted that the purpose of the rule in subparagraph (d), which vested the foreign representative with the right to intervene in local proceedings, was linked to the fact that the stay of proceedings provided by subparagraph (a) did not affect local collective proceedings.

Subparagraph (e)

154. The Working Group noted a suggestion that an indication should be added to the text of the subparagraph to provide for the continuation of measures that might be granted by the court on an interim basis pursuant to paragraph (4), as one of the optional forms of relief the court was empowered to grant by virtue of subparagraph (e).

155. There was general agreement with the approach of subparagraph (e), as regards the reference to the factors in subparagraphs (e)(i) to (iii) that may serve in some cases to limit the granting of relief to the foreign representative beyond the effects provided in the minimum list (subparagraphs (a) to (d)). The point was made, however, that perhaps it might be possible to draft the reference to those factors in a way that it might be even clearer that they were intended to serve as a possible limitation on the obligation to grant additional forms of relief rather than as a source of authority for such additional relief. The suggestion was that the words "subject to" might not be sufficiently clear in that regard.

156. Considerable attention was devoted by the Working Group to the manner and extent of the reference in subparagraph (e) to the law to be applied by the recognizing court in determining what additional relief could be granted beyond the effects on the minimum list. The point was made that application of the law of the recognizing State would have the particular advantage of being familiar to and well understood by the recognizing court. While the view was expressed that application of the foreign law was more likely to be acceptable were the instrument to take the form of a convention rather than a model law, it was pointed out that there was precedent for national insolvency laws to refer to application of the foreign law for the purposes of determining the effects of recognition. However, the Working Group did not take the position that the legal text being prepared should have reference solely to that law.

157. The Working Group attached particular importance to the understanding that in practice it was most typical for a foreign representative to seek in the recognizing jurisdiction implementation of powers with which the representative was vested by the home jurisdiction, i.e., the jurisdiction that opened the proceeding being recognized. It was reported that problems were most likely to arise when the law of the recognizing State would be unfamiliar with or silent as regards a power sought to be exercised by the foreign representative, and that reference to the law of the foreign proceeding would be helpful in this respect. At the same time, it was widely recognized that to one degree or another the granting of relief beyond the effects on the minimum list could not be addressed in a vacuum, without reference to the local law of the recognizing court.

158. In view of the above considerations, there was broad agreement with the approach in the draft provision that the powers of the foreign representative under the law of the jurisdiction in which the foreign proceeding was opened should be retained. Concomitantly, the Working Group favoured retention of a proviso along the lines of that contained in the draft provision excluding the granting of powers that were granted to the foreign representative under the foreign law but that ran afoul of prohibitions in the local law.

159. Beyond that area of fairly broad agreement, various views and suggestions were adduced as to what additional scope there might be for application of the local law as a basis for according effects of recognition beyond the effects in the minimum list, and what the proper mix might be between the foreign and the local law.

160. A number of interventions were directed at the favourable aspects, from the standpoint of the interests of creditors and of maximizing the value of the estate, of allowing the foreign representative to pick and choose powers that may be available under either of the laws of the foreign proceeding or of the recognizing State. It was pointed out that such an approach would discourage forum shopping and thereby limit the degree to which assets could be dissipated or otherwise insulated from insolvency administration. However, those considerations could be offset to one degree or another by the hesitation that States might feel at the prospect that a foreign representative, by virtue of having a pick of powers granted by either law, would through recognition in a foreign jurisdiction potentially acquire more power than was vested in the representative by the home jurisdiction.

161. Other observations were made in the discussion as to the mix of local and foreign law that might determine the powers of the foreign representative and the measures granted beyond the minimum list. It was stated that one might distinguish between the foreign law as the source of authority or power of the foreign representative, and the local law as providing the procedures for implementing those powers. An observation along similar lines was that the local law might be

regarded as the source of authority for enforcement of the rights of the foreign representative, which might present an attractive analytical framework for legal systems that placed particular emphasis on distinguishing between a right and the enforcement of that right. It was further observed that systems involving a combination of two laws would raise the difficulty of drawing borderlines as to the specific areas of application of each law.

162. Reference was also made to the possibility that it might be useful to draw a distinction between the case of an ancillary, assisting proceeding, and the case of parallel insolvency proceedings. The view was expressed that providing a rule for the former case might be less difficult a task than for the latter case. In response to that suggestion, however, it was stated that the question of compatibility of measures with the local law would be present in the ancillary proceeding case, as well as in the context of parallel proceedings.

163. A suggestion was made that various of the above factors might be taken into account by including a formulation calling on the court to have "due regard" to both the law of the foreign proceeding and to its own law. A somewhat different approach that drew some interest was that it might be possible to formulate a provision without reference to one or the other possible applicable law, but rather to leave the matter in the hands of the court. It was suggested that such an approach would enable the foreign representative to request the measures thought necessary for the exercise of the representative's mission, and the recognizing court in turn could respond on a similar basis, by granting the measures that it thought were appropriate and that were within its power to grant. In support of such an approach it was said that it would be in line with the basic presumption that assistance and cooperation should be afforded to the maximum degree feasible.

164. Yet another observation was that in designing the provisions in this area regard should be had to the types of procedures and practices provided under the Hague Convention on the Taking of Evidence Abroad, in particular as regards the notion of activity by the foreign representative having to be compatible with the local law. It was suggested in this regard that practice under that Convention might be a useful guideline as to how far various States would be prepared to go in matters of the type being discussed.

165. In concluding its discussion of which of the possible applicable laws should be referred to in authorizing measures beyond the minimum list of effects of recognition, the Working Group noted that there was a prevailing view in favour of an approach based on application of the law of the foreign proceeding. At the same time, it was widely felt that reference would have to be made to a limitation based on prohibitions in the local law. The view was also widely shared that application of the local law should not lead to an enhancement of the powers of the foreign representative beyond those accorded by the representative's home law. That being said, the Working Group agreed that the matters that had been raised warranted further consideration and it agreed to return to them at a later stage.

166. By way of a drafting suggestion, it was noted that the term "liquidator", appearing in subparagraph (e), would be replaced by the term "foreign representative". It was also suggested that the expression "under the law" might be overly restrictive. A suggestion of a more structural nature was that the matters in subparagraph (e) might be dealt with in a provision on judicial cooperation.

Paragraph (2)

167. Questions were raised as to the exact function of paragraph (2). A concern was expressed that paragraph (2) might be seen as inconsistent with the intent of paragraph (1) and that it might be better therefore to delete it. In response, it was noted that the provision was intended to provide a basis for an application by a party aggrieved by effects of recognition to seek relief from application of those effects. In light of that analysis, it was suggested that a clearer approach might be to include a straightforward provision to the effect that there was a right to petition for relief from effects of recognition. The question was raised in this regard whether provision for the modification of effects of recognition needed to be made solely for those effects that were automatic, or also for those that were issued at the discretion of the court pursuant to its power under paragraph (1)(e).

168. Another function of the provision was to address the situation in some jurisdictions that effects of recognition, in particular measures of an interim nature, might automatically lapse after a certain period of time. It was noted, however, that the provision may be understood as dealing not with interim measures, which were the subject of paragraph (4) and for which such a rule might well be necessary, but with effects of recognition, for which a rule concerning continuation in effect might not be necessary as such.

169. The above discussion did nevertheless raise the question of whether some provision should be included on the question of the period of continuation in force or point of termination of effects of recognition. One approach was that it could be assumed that the court in providing for effects would ensure that they remained in place for as long as was needed. It was also suggested that to one degree or another, certain of the effects would automatically cease to have relevance or effect once their purpose had been fulfilled by the natural progression of events related to those effects. The view was expressed that it may well be desirable to include a provision providing a degree of certainty as to the question of the validity period or termination of the effects of recognition.

170. The question was raised in the discussion as to what effect might be attributed to termination of the foreign proceeding, especially as regards the question of the termination of the effects of recognition. A related question was whether there should be any particular publication requirements associated with termination either of the foreign proceeding or of the effects of recognition. The view was expressed that the imposition of some sort of formality in connection with the termination of the effects of recognition might be a useful measure in view of the implication of recognition for the rights of local creditors. It was observed in this regard that the local law may well cover the question of publication requirements and that it might in that light suffice to refer to "such notice as is required by the local court". At the same time, it was acknowledged that such an approach might be more difficult to rely on to the extent that there might not be in a particular jurisdiction a central publication in which creditors could be expected to find notifications of the type in question.

171. The Working Group noted that it would continue its deliberations on the questions that had been raised on the basis of provisions that were developed further taking into account the above discussion.

Paragraph (3)

172. The Working Group expressed its understanding that the word "directly" in paragraph (3) was intended to establish the right of the foreign representative to petition the recognizing court directly, rather than having to proceed through some indirect channel, such as a diplomatic channel. It was noted that the provision was not intended, however, to override requirements that may be applied in some jurisdiction as to appearance through local counsel.

173. As regards the placement of paragraph (3), the view was expressed that it would be more appropriate to place it at the head of the provision currently being discussed.

Paragraph (4)

174. The Working Group generally supported the inclusion of a provision authorizing the recognizing court to grant provisional measures in appropriate circumstances upon application by the foreign representative. That approach was supported on the grounds that, absent such a possibility, the effects of recognition, in particular the stay of individual creditor action and of transfer of assets, could only take effect upon the decision on an application for recognition, by which time there would often be little left in the way of assets to be protected.

175. The question was raised whether the Working Group, in a further development of paragraph (4), might wish to consider identifying one or the other provisional measure that was contemplated, or whether the matter might simply be left fully to the local law. Candidate measures suggested for consideration referred to bringing assets within the custody of the foreign representative, entitling the foreign representative to seize certain assets and prohibiting creditor enforcement of claims against assets of the debtor.

176. The Working Group expressed its understanding that the provision as presently drafted permitted provisional measures to be granted on an ex parte basis where such measures would be permissible under local law.

177. As regards matters of drafting, it was observed that the expression "until the application for recognition ... is determined" might not be understood and that it may be clearer to use words along the lines of " ... until the application has been decided by the court". It was also suggested that it be clarified that paragraph (4) referred in its opening words to assets of the debtor.

E. Proof concerning foreign proceeding

178. The Working Group considered the following preliminary draft provision on proof concerning foreign proceedings:

> "(1) The existence of a foreign proceeding shall be evidenced by a certified copy of documents demonstrating the opening of foreign proceedings.
>
> (2) The appointment of a foreign representative shall be evidenced by a certified copy of the order or decision of appointment or other proof to the satisfaction of the court.

(3) A translation into an official language of the country in which the local proceeding is pending may be required.

(4) A foreign proceeding shall be presumed to have been properly opened in the foreign jurisdiction, unless it is proved that there was no substantial connection between the debtor and that jurisdiction."

179. It was noted that the above provision reflected the views expressed in the Working Group at an earlier stage of the discussion (see paras. 36-38, and 113) that provision should be made for providing the recognizing court with assurance that the foreign representative had authority from the appointing jurisdiction to act abroad, in particular with respect to assets located abroad. At the same time, it was noted that the draft provision was formulated so as to avoid mentioning a literal requirement of authorization to act abroad, since it had been observed that including such a specific requirement would not be in line with practice. It was pointed out in this regard that the appointment of a representative would typically be phrased in a general manner, without reference to territorial limitation of ability to act.

180. It was further noted that paragraphs (1) and (2) had been developed in response to the view that presentation of a certified copy of the act of appointment, or in its absence, of other proof of appointment, should be sufficient. It was also noted that paragraph (4), creating a presumption that the foreign proceeding had been properly opened was based on the view that no unnecessary obstacles should be placed in the way of the foreign representative acquiring the ability to act expeditiously in order to preserve assets.

Paragraphs (1) and (2)

181. While there was agreement that paragraphs (1) and (2) addressed in an acceptable way the problem of the necessary accreditation of the foreign representative before the competent court in the recognizing jurisdiction, a number of observations were made. One observation was that paragraphs (1) and (2) might be misinterpreted as requiring in all cases two separate documents, one establishing the opening of the foreign proceeding and another evidencing the appointment of the foreign representative, when in fact there would be instances in which the foreign court would issue a single document covering both points. A number of suggestions of a drafting nature were made in order to address that concern, including: to predicate paragraph (2) on paragraph (1); to replace the word "shall" by the word "may"; and to combine paragraphs (1) and (2) in one paragraph along the following lines: "Proof of the opening of the foreign proceeding and the appointment of the foreign representative shall be given. Such proof may be in the form of a certified copy or in any other form required by the court.".

182. Another observation was that reference to "other proof to the satisfaction of the court" might defeat the purpose of specifically referring to the court order or other decision appointing the foreign representative and introduce some uncertainty. In order to alleviate that concern, the suggestion was made that paragraph (2) should be revised to clarify that other proof could be required only in the absence of a court order or other decision of appointment. It was noted that the provision might be made more specific by requiring the presentation of a certified copy of a statutory rule in those cases in which a foreign representative was relying on such a statutory grant of authority, to the extent that such cases actually did occur. Yet another observation was that reference to certification of the court

order or decision of other competent authority could introduce some uncertainty unless it was made clear that what was being referred to was an indication of authenticity by the issuer of the document, and not "legalization", namely, more complicated proceedings usually conducted by an administrative authority, or through diplomatic or consular channels.

183. The Working Group agreed on the substance of paragraphs (1) and (2) and requested the Secretariat to revise them taking into account the concerns and suggestions expressed.

Paragraph (3)

184. While the view was expressed that the provision may be self-evident and unnecessary, or would raise questions as to certification of the translation, the Working Group hesitated to delete paragraph (3), since it felt that the possible requirement set forth in paragraph (3) was useful to mention and would add to the acceptability of the text.

Paragraph (4)

185. A number of concerns were expressed as to the exact formulation of paragraph (4). One concern was that the reference to the "proper" opening of the foreign proceeding might suggest that the recognizing court should involve itself in an examination of whether the foreign proceeding had been opened in accordance with the detailed procedural requirements of the foreign jurisdiction. The focus of the examination by the recognizing court was instead rather to be limited to the question of jurisdiction. It was generally felt that issues of the former type were beyond the authority of the recognizing court to examine. A suggestion to deal with that concern was to recast paragraph (4) along the following lines: "A foreign proceeding shall not be recognized if there is no substantial connection between the debtor and the jurisdiction in which that proceeding was opened." Another suggestion was to delete paragraph (4), since the matter might be covered in paragraph (2) of the definition of "foreign proceeding". That suggestion did not attract sufficient support on the grounds that the Working Group, in its discussion of that provision (see paras. 110), had widely shared the view that such a rule related to recognition of foreign proceedings and should be placed elsewhere in the text.

186. It was further observed that certain unusual cases in which the foreign proceeding met the jurisdictional test, but might not merit recognition, could be dealt with on public policy grounds. An example was the case in which foreign proceedings were being pursued in collusion between the debtor and the foreign representative for the purpose of concealment of assets. In the discussion, the view was also expressed that the content of the "substantial connection" test would differ depending on whether recognition was sought for an ancillary or for a parallel proceeding.

187. Another concern was that the matter of the jurisdiction of the recognizing court could not be appropriately addressed unless the question of the jurisdiction of the court of the originating State were also addressed, as there could be an interplay between those questions. In order to address that concern, the suggestion was made that international jurisdiction of a court opening insolvency proceedings might be dealt with in a comprehensive manner, an approach illustrated by article 3 of the EU draft Convention. The view was expressed in this context that attention needed to be given to the possibility that provisions on recognition might have the effect of limiting the jurisdiction of

the recognizing State to open its own local proceedings.

188. The view was also expressed that it was important to determine the stage of the foreign proceeding that should be considered as signifying the actual "opening" of the foreign insolvency proceeding for the purpose of according recognition to it. It was observed in that regard that jurisdictions varied as to steps and stages involved in the opening of a proceeding. It was further observed that that issue was of some importance, since a request for provisional relief in the recognizing jurisdiction would often be filed while the application for the opening of an insolvency proceeding in the originating State was pending.

189. While the Working Group agreed that the question of assessing the jurisdiction basis of the foreign proceeding was an important one and should be dealt with in the text, it was not prepared to reach a definitive decision as to what might be an acceptable answer. It therefore decided to leave paragraph (4) in square brackets subject to further consideration.

V. FUTURE WORK

190. Upon concluding its deliberations as described above, the Working Group heard a number of interventions concerning the progress achieved at the current session and further issues that might be addressed.

191. It was generally felt that measurable progress had been made with regard to a number of important issues, including the definitions of "foreign proceeding" and "foreign representative", the effects of recognition, judicial cooperation and proof of foreign proceedings. It was stated that the fact that the Working Group engaged in fruitful discussions and considered a number of preliminary draft provisions at the session set the stage well for continued work.

192. A number of issues were mentioned for future work, including: jurisdiction of the foreign court and recognition of such jurisdiction by a court in the recognizing State; the applicability of the draft provisions to ancillary or to parallel proceedings, and their applicability when there were no local proceedings; definitions of the debtor and of reorganization proceedings; comity and reciprocity issues; the scope of judicial cooperation; the possibility of the foreign representative appearing in the recognizing jurisdiction without being subject to full jurisdiction ("limited appearance"); national treatment of foreign creditors as well as the form and time-frame for notification of foreign creditors; process of equalization of distributions to common creditors; recognition of foreign Government or revenue claims; mechanism for terminating a limited or secondary proceeding; effects of recognition and of provisional relief on secured creditors, in particular in the context of rights in rem and reservation of title arrangements; set-off in a cross-border context; exceptions to automatic relief; discharge of debts owed to the debtor; mechanism for modifying or terminating provisional relief; distribution and repatriation of assets; and preservation of assets in a cross-border insolvency context by creating a legal framework for provisional relief to be granted, in particular with regard to assets in the hands of third parties by virtue of court orders or contracts.

193. The Working Group requested the Secretariat to prepare for the next session of the Working Group draft provisions on judicial cooperation and access and recognition, taking into account the views and suggestions expressed at the current session. It was noted that, in line with a decision made by the Commission at its twenty-eighth session 6/, the nineteenth session of the Working Group would be held in New York, from 1 to 12 April 1996.

Notes

1/ Report of the United Nations Commission on International Trade Law on the work of its twenty-eighth session (1993), Official records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), paras. 382 to 393. In that decision, the Commission renamed the Working Group to its present title, from the former title, Working Group on the New International Economic Order, through the session members of the Working Group continue in sequence.

2/ Report of the United Nations Commission on International Trade Law on the work of its twenty-sixth session (1993), Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17), paras. 302 to 306. The background note on which the Commission based its discussion at the twenty-sixth session is contained in document A/CN.9/378/Add.4.

3/ The report on the UNCITRAL-INSOL Colloquium on Cross-Border Insolvency presented by the Secretariat to the Commission at the twenty-seventh session is set forth in document A/CN.9/398.

4/ Report of the United Nations Commission on International Trade Law on the work of its twenty-seventh session (1994), Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17), paras. 215 to 222.

5/ The report on the Judicial Colloquium presented by the Secretariat to the Commission at the twenty-eighth session is set forth in document A/CN.9/413.

6/ Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), para. 449.